In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 167

HUNILDA BALBAS GARDINER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12) is reported at 341 F. 2d 896. The opinion of the district court is reported at 237 F. Supp. 692. The opinion of the court of appeals affirming the conviction on direct review is reported at 321 F. 2d 159.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1965. The petition for a writ of certiorari was filed on May 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

777-702—65

QUESTION PRESENTED

Whether petitioner was denied the effective assistance of counsel by reason of the fact that she and her husband (a codefendant) were represented by the same attorneys at trial.

STATEMENT

Petitioner and her husband were jointly tried and convicted before a jury in the United States District Court for the Southern District of Texas of conspiring to smuggle, to conceal, and to facilitate the transportation of marijuana in violation of 21 U.S.C. 176a (Tr. 11–19).[1] Petitioner was sentenced to five years' imprisonment, the minimum term permissible under the statute (Tr. 999–1000). The court of appeals affirmed petitioner's conviction over her claim that she was prejudiced by the joint trial in that there was insufficient time to prepare a defense and that most of the testimony at trial related solely to her husband. 321 F. 2d 159, certiorari denied, 375 U.S. 953. Thereafter, petitioner filed a petition, treated by the district court as a motion to vacate sentence under 28 U.S.C. 2255, in which she complained for the first time that she had been deprived of the effective assistance of counsel because she was represented by the same attorneys[2] who defended her husband, and their in-

[1] The record on this motion to vacate sentence will be referred to herein as "R." We are also filing with the Clerk of the Court the original trial transcript, which will be referred to as "Tr."

[2] Petitioner and her husband were represented at trial by privately employed counsel, Bernard Golding, a member of the Houston Bar. Mr. H. C. Hall, a member of the local Laredo Bar, was associated with Mr. Golding.

terests conflicted. At a hearing petitioner elected to stand on her verified petition and the supporting affidavits of her husband and mother-in-law (R. 3–5, 34–35, 56–62). The district court denied the motion (R. 65–69; 237 F. Supp. 692), and the court of appeals affirmed *per curiam* (Pet. App. 12).

The trial testimony may be summarized as follows:

Arthur Athens testified that Robert Gardiner approached him in New York City and solicited him to smuggle marijuana into the United States (Tr. 125). Gardiner had access both to a supply in Mexico and to customers in New York (Tr. 125). As a result, Athens went to Monterrey, Mexico, in August 1960, received marijuana from Gardiner, and sold it in New York (Tr. 130–148).

The next month, on a second trip to Mexico, Athens visited Gardiner's rooms at a hotel in Veracruz where he met petitioner (Tr. 155–156). One of the rooms was a large shower room filled with marijuana leaves (Tr. 157). For three days, petitioner tended the apartment and the two men rolled the leaves into smaller packages (Tr. 158), which were later hidden in an automobile and driven across the border by Colette Meyers (Tr. 158–164). After meeting Meyers on the American side of the border, Athens arranged to have the marijuana shipped to New York, where it was sold to Gardiner's customers (Tr. 166–170). Athens deposited the proceeds from the sales in a Manhattan checking account belonging to petitioner (Tr. 171).

In October, another trip was attempted (Tr. 180). Athens remained in Laredo while Alberta Curtis drove to Monterrey to meet Gardiner (Tr. 174–175, 402–404). After the meeting, Mrs. Curtis was driven to a motel where she watched Gardiner and petitioner roll marijuana leaves into packages (Tr. 412–418). Later while petitioner and Mrs. Curtis stood watch, Gardiner hid the packages in an automobile (Tr. 419–422). Mrs. Curtis departed in the car with the marijuana and was arrested at the border (Tr. 427–429).

The defense offered for both defendants at trial was primarily the testimony of petitioner. She admitted that she and her husband had been in Veracruz and Monterrey and that they had met the prosecution witnesses, but asserted that they had handled no marijuana (Tr. 581–695). Petitioner's husband did not testify.

ARGUMENT

Petitioner's motion to vacate her sentence on the ground that her interests at trial conflicted so severely with those of her husband that representation of both defendants by the same attorney deprived her of her right to the effective assistance of counsel was properly denied by the courts below. The record shows that petitioner was represented by counsel of her own choice.[3] At no time during trial or on appeal did she

[3] As the trial court noted (R. 10–12), refusal to accept petitioner's freely chosen attorney would have presented a serious question of denial of the right of counsel. This Court has stated that "[i]t is clear that a defendant in a state criminal trial has an unqualified right * * * to be heard through his own counsel." *In re Groban*, 352 U.S. 330, 332; cf. *Chandler* v. *Fretag*, 348 U.S. 3, 9; *Powell* v. *Alabama*, 287 U.S. 45, 69.

suggest that the assistance she was receiving from her chosen counsel was inadequate. The record demonstrates that the court inquired in petitioner's presence, at her arraignment, about a possible conflict of interest. Counsel then indicated that he had discussed it with both defendants (Tr. 47), and petitioner then sought only to have her case tried at a later date because she needed more time to prepare her defense. She expressed no desire to retain a separate attorney. It appears, therefore, that counsel and both defendants had discussed and considered a possible conflict of interest and that petitioner elected to proceed to trial with joint representation, although hoping that she might be tried separately.

Petitioner's only evidence of the asserted conflict of interest was her verified petition and supporting affidavits by her husband and mother-in-law. During the hearing in the district court, the trial judge repeatedly asked whether further testimony was desired or would be offered (R. 4, 34–35). The attorney who represented petitioner at trial was not called. The court of appeals properly concluded, therefore, that "[o]n this record of partisan statements free from cross examination, the Judge had ample basis for his conclusion that Petitioner had failed to demonstrate conflicts of interest meriting another trial * * *" (Pet. App. 13).

Nor do the facts now alleged by petitioner suffice to establish that she had been deprived of effective assistance of counsel due to a conflict of interest. Petitioner alleges that counsel vigorously cross-exam-

ined a prosecution witness who assertedly exculpated petitioner and incriminated her husband and that counsel had petitioner testify while having her husband remain silent (Pet. 6–9). But the witness who was vigorously cross-examined—Athens—did incriminate petitioner along with her husband, and it was in the interest of both defendants to have him discredited. The statement which petitioner considers exculpatory (Pet. 8)—that "she did not see what was going on" (Tr. 158)—relates, in our view, to petitioner's young Mexican maid. And petitioner's testimony did not incriminate her or her husband; it merely provided innocent explanations for events which had been documented and established by the government.

Petitioner also argues that she was prejudiced because, without the advice of independent counsel, she was forced to decide whether or not to plead guilty to a tax count having no minimum sentence (Pet. 6). It is clear, however, from petitioner's own allegations that after the trial commenced she was told (1) that she could plead guilty to a "lesser" offense; (2) that a plea of guilty by her would be detrimental to her husband's case; and (3) that the government's offer at that time demonstrated weakness in the government's case against her. Her husband himself so told her (R. 59–60). Since counsel was not called to testify at the hearing, it is impossible to say what part he played in this discussion. In any event, petitioner's decision was made by herself alone on the basis of considerations of which she

had been informed. Petitioner knowingly and deliberately decided to stand trial with her husband, and assumed the benefits and burdens of joint representation by the counsel whom they had decided to engage.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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